SHORTER ARTICLES, COMMENTS AND NOTES

THE CASE FOR NATIONALITY BASED JURISDICTION

I. INTRODUCTION

Various recent developments within and without the United Kingdom have strengthened the arguments in favour of the adoption of general nationality based criminal jurisdiction. These arise from problems in the application of territorial jurisdiction, increasingly frequent crime-specific reference to nationality based jurisdiction, the development of European Union law, the ever-greater mobility of nationals, the ability to commit crimes remotely, the incorporation of the European Convention of Human Rights and Fundamental Freedoms into United Kingdom law, an evolution in the citizen-state relationship, and the increasing internationalisation of criminal law. It is not suggested that territory should no longer find a central place in the criminal law rather that the original and present arguments in its favour have been greatly weakened and, at the same time, the arguments in favour of nationality based jurisdiction have been strengthened. This article details the present nature of criminal jurisdiction, highlights the deficiencies with territorial jurisdiction and outlines the case in favour of a general nationality based criminal jurisdiction.

II. UNITED KINGDOM CRIMINAL JURISDICTION

A. Territorial Jurisdiction

The United Kingdom criminal legal systems generally adopt a territorial approach to criminal jurisdiction. Lord Young in *HM Advocate v Hall* stated 'The general rule is that criminal law is strictly territorial—so that a man is subject only to the criminal law of the country where he is, and that his conduct there, whether by acting, speaking, or writing, shall be judged of as criminal or not by that law and no other.'[1] The corollary of criminal law being territorial is that it does not apply abroad. Hume writes:

> A person domiciliated here, whether a Scotsman or a foreigner, for any crime he may have committed abroad, is not liable to be tried before our courts. They are not instituted to administer justice over the whole world, but in our country, or a particular district of it only; and, therefore, if the crime charged has been committed beyond those limits, they are neither called upon not entitled to step forward for its correction.[2]

From the earliest times however this rule has admitted two exceptions, one partial and one complete. Partially it has been construed to admit jurisdiction in cases where offences are not fully or completely committed within the territory. It has also been completely excepted, with unequivocal extraterritorial jurisdiction being assumed.

The extension of territorial jurisdiction to govern circumstances where an offence is not fully or completely committed within England and Wales or Scotland comprises, in the language of international law, objective and subjective components. These reflect the fact that the law extends to circumstances where the crime commences

1. (1881) 4 Couper 438. It should be noted that criminal jurisdiction in Scotland is almost wholly common law whilst in England and Wales statute plays a greater role.
2. Hume, ii, 52.

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outside the territory and concludes or has an effect within it, and where a crime commences within the territory and concludes or has an effect outside it. A statute governed the former extension as early as 1548:

> [w]here any person or persons hereafter shall be feloniously stricken or poisoned in one county, and die of the same stroke or poisoning in another county, that then an indictment thereof founden by jurors of the county where the death shall happen . . . shall be as good and effectual in the law, as if the stroke or poisoning had been committed and done in the same county where the party shall die.[3]

A jurisdictionally similar Scottish example is *HMA v Witherington*.[4] Here it was held that the courts in Scotland had properly taken cognisance of crimes of falsehood, fraud, and wilful imposition even though the accused was outwith Scotland during the relevant period. The Lord Justice-General stated:

> The objection is rested on these considerations, that the panel is an Englishman; that the only fraud or criminal act alleged against him was committed in England: that he never was in Scotland, and is not subject to the criminal law or to the jurisdiction of the criminal Courts of Scotland; that criminal jurisdiction does not extend *extra territorium*, and that the true foundation of ordinary criminal jurisdiction is the *locus delicti*.[5]

To which he answered 'The argument is certainly plausible, and there is, at first sight, something startling and paradoxical in the proposition that a man may commit a crime in a place in which he was never personally present. This proposition is nevertheless technically or constructively, but actually, true . . .'.[6]

The converse of objective territorial jurisdiction, subjective jurisdiction, also has long-standing pedigree. Section 10 of the Offences Against the Person Act 1861 *inter alia* states:

> Where any person . . . being criminally stricken, poisoned, or otherwise hurt in any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter . . . may be dealt with, inquired of, tried, determined, and punished . . . in England and Ireland. . . .

Modern examples are found in s. 5(1) of the Criminal Justice Act 1993 and s. 1 of the Sexual Offences (Conspiracy and Incitement) Act 1996. The former Act *inter alia* prescribes conspiracy to commit theft and blackmail outside the United Kingdom and the latter *inter alia* conspiracy and incitement to commit sexual acts against children outside the United Kingdom.

B. Extraterritorial Jurisdiction

In addition to territorial jurisdiction (and its extensions) United Kingdom criminal law is applied on two other bases: universality and nationality or allegiance. In regard to the

3. (1548) 2 and 3 Edw VI C. 24. Admittedly this provision governs venue not international jurisdiction. It was not until three centuries later (by (1828) 9 George IV C.31) that a similar provision replaced municipal applicability with that of international.

4. (1880–1) 8 SC (JC) 41.

5. Ibid. at 46.

6. Ibid. A similar modern English case is *DPP v Stonehouse* [1978] AC 55 for which see below.

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former the United Kingdom has increasingly come to adopt universal jurisdiction in regard to crimes whose pedigree is international convention.[7] Torture is a germane example. The Criminal Justice Act 1988 s.134 prescribes the crime, its basis being the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment 1984,[8] this provision, of course, being at issue in the Pinochet proceedings.[9]

It is the United Kingdom's employment of nationality or allegiance as a basis of jurisdiction that is more relevant for our present purposes. The assumption of jurisdiction on this basis is long-standing and increasingly frequent. Nonetheless it remains exceptional, the general rule being that 'offences committed by British subjects out of England are not punishable by the criminal law of this country'.[10] Treason is applied on the basis of allegiance. It is prescribed by the Treason Act 1351.[11] A notable statute in this regard is the Offences Against the People Act 1861. It prescribes extraterritorial bigamy,[12] murder and manslaughter on the basis of nationality. Section 9 *inter alia* provides:

> Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty in respect of any such case, whether the same shall amount to the offence of murder or manslaughter . . . may be dealt with, inquired of, tried, determined, and punished . . . in England or Ireland . . . [P]rovided, that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act.[13]

Jurisdictionally similar offences are found in the Slave Trade Act 1824 read with the Slave Trade Act 1873, the Foreign Enlistment Act 1870,[14] the Unlawful Oaths Acts 1797–1812, the Explosive Substances Act 1883,[15] the Immigration Act 1971, the Representation of the People Act 1983, and the Official Secrets Act 1989.[16] More

7. Although piracy is now the subject of convention, the Law of the Sea Convention 1982 (1982) 21 ILM 1261 (previously the Geneva Convention on the High Seas 1958 (1963) 5 UKTS, Cmnd 1929), universal jurisdiction was notably assumed prior to conventional treatment in *In Piracy Jure Gentium* [1934] AC 586.

8. (1985) Cmnd. 9593, Misc 12.

9. The United Kingdom's legal involvement with Pinochet began on 17 Oct. 1998 with his arrest. It came to an end with his flight back to Chile on 2 Mar. 2000. The most pertinent judgments are the original decision of the Divisional Court on 28 Oct. 1998, *The Times*, 3 Nov. 1998 [2000] 1 AC 61, which was set aside as a result of the Committee not being properly constituted [2000] 1 AC 119, and the second substantive decision of the House of Lords on 24 Mar. 1999 [2000] 1 AC 147.

10. *R v Page* [1953] 2 All ER 1355 at 1356 per Lord Goddard CJ.

11. For treason being applied extraterritorially (and infamously) see *Joyce v DPP* [1946] AC 347.

12. See *The Trial of Earl Russell* [1901] AC 446.

13. This has relatively recently been applied to Mohan Singh Kular. He was convicted for the murder of his wife in the Punjab, see *The Times*, 4 Nov. 1997.

14. For an example of the extraterritorial application of the Act see *R v Jameson* [1896] 2 QB 431.

15. Section 2 as amended *inter alia* states 'A person who in the United Kingdom or (being a citizen of the United Kingdom and Colonies) in the Republic of Ireland unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or cause serious injury to property . . . shall be guilty of an offence . . .'.

16. Section 15 (1) of the Official Secrets Act 1989 states 'Any act- (*a*) done by a British citizen or Crown servant; or (*b*) done by any person in any of the Channel Islands or the Isle of Man

recent reference to nationality as a basis of jurisdiction is found in the Sex Offenders Act 1997, the Landmines Act 1998, and the Nuclear Explosions (Prohibition and Inspections) Act 1998. The International Criminal Court Act 2001 provides that United Kingdom nationals as well as residents who commit genocide, war crimes and crimes against humanity outwith the United Kingdom are liable for those crimes in England, Wales and Northern Ireland.[17] It is evident that there are a significant number of offences that may be committed by persons outwith the territory of the United Kingdom on the basis of the nationality/allegiance of the accused. This, in itself, is one of the arguments in favour of a general nationality based jurisdiction.

III. THE CASE FOR NATIONALITY JURISDICTION

There are both negative and positive arguments that support the adoption of a general nationality based jurisdiction. Central to the negative arguments is the fact that territorial jurisdiction is increasingly excepted and stretched. Law and society have evolved to reduce the rationality and efficacy of territorial criminal law. One of the original rationales of territorial jurisdiction was that it was desirable that accused persons' guilt or innocence be decided by those aware of his or her character and reputation and thus be able to judge more accurately.[18] Relatedly, territorial jurisdiction 'promoted the common law ideal of confrontation in criminal cases by ensuring that suspects would face trial near the scene of the crime, where witnesses and evidence were more readily available'.[19] The weight of the former of these factors (that jurors are aware of the accused) has been greatly reduced if not completely negated by the great mobility and transience of persons. Indeed the role of jurors as 'know-ers' of fact is now obsolete and could well possibly give rise to a challenge under Article 6 of the European Convention on Human Rights.[20] The latter factor (the procedural and evidential benefits), whilst undoubtedly significant, has to some extent at least been overcome by the growth in international (and national) co-operation in criminal matters.[21] It is now

or any colony, shall, if it would be an offence by that person under any provision of this Act . . . [with limited exceptions] . . . when done in the United Kingdom, be an offence under that provision.'

17. The Act enables the United Kingdom to ratify the Rome Statute of the International Criminal Court 1998, cited at <http://www.un.org/law/icc/index.html>. The Scottish Parliament is responsible for providing similarly in Scotland.

18. The historical rules of venue existed because 'Jurors originally combined the functions of "know-ers" of facts and the prisoner was entitled to have his guilt determined by jurors drawn from an area where the inhabitants would be most likely to know the facts alleged to constitute the crime with which he was charged.' *R v Treacy* [1971] AC 537 at 559 per Lord Diplock.

19. G. R. Watson, 'Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction', (1992) 17 Yale Journal of International Law 41 at 45. Here the author argues in favour of the United States adopting nationality jurisdiction to fill the jurisdictional gap where foreign States do not prosecute an American for a crime committed within its territory and the United States cannot for lack of jurisdiction.

20. *See Holm v Sweden* (1993) EHRR Series A, No. 279-A.

21. International law has seen an explosion in mutual assistance treaties. In Europe the European Convention on Mutual Assistance in Criminal Matters 1959 had thirty-nine parties as at 5 Mar. 2001, including the United Kingdom, see <http://conventions.coe.int/treaty/>. The Model Treaty on Mutual Assistance in Criminal Matters was adopted by the General Assembly in Dec. 1990 (GA Res. A/Res/45/117).

possible to convict (fairly) persons accused of crimes committed some distance in space as well as time from the trial venue.[22]

The decline in the importance of territory for the purposes of jurisdiction has been accompanied by a lessened significance of borders. This factor is particularly pertinent within the European Union, where borders have come to assume a lesser and lesser importance. Citizens of the EU are entitled by law to move within the fifteen Member States.[23] Individuals not only travel internationally with increased frequency, this conjoined with technology has given rise to the ability to commit crimes remotely. The recent conviction of Abdelbaset Ali Mohmed Al Megrahi for murder relating to the bombing of Pan AM flight 103 over Lockerbie in December 1998 is a germane example. In a preliminary diet 8 December 1999 Megrahi argued that Scotland lacked jurisdiction as the indictment failed to mention any actions by Megrahi being committed in Scotland at all.[24] This was refused and Megrahi was ultimately convicted.[25] All of the above factors are in a sense negative. They outline why the existing territorial jurisdictional scheme is inadequate, implicitly lending weight to its amendment that, it is suggested, is the adoption of nationality based jurisdiction.

There are several strong positive arguments in favour of a move to nationality based jurisdiction. The incorporation of the European Convention on Human Rights into United Kingdom domestic law by the Human Rights Act 1998 provides the basis of one of them. One result of incorporation is that all criminal trials are now tested against the Convention in United Kingdom courts. The right to a fair trial, the right to liberty and security of the person, and the right to be free from retrospective criminal legislation are all now part of municipal United Kingdom law.[26] Exercising jurisdiction on the basis of nationality would be a method whereby these rights could be applied to those who are accused of crimes abroad and may not otherwise be afforded this protection. That concern over the propriety of criminal proceedings against United Kingdom nationals in various foreign States has been historically and presently raised strengthens this point.[27] The possible beheading of Alexander Mitchell after his televised confession for a bombing incident in Riyadh is one present instance.[28] The final abolition of capital punishment in the United Kingdom is a further factor.[29] Presently, with the lack of

22. A notable English example is the conviction under the War Crimes Act 1991 of Anthony Sawoniuk on 1 Apr. 1999 (appeal dismissed 9 Feb. 2000) for murder in Domachevo, Belarus, in Sept. 1942. For a discussion of Canadian and Australian prosecutions that suffered from difficulties in space and time see P. Arnell, 'War Crimes—A Comparative Opportunity' (1996) 13 (3) International Relations 29.

23. Related to the above, the Maastricht Treaty provided for the so-called Third Pillar of the European Union. It made co-operation in criminal matters a matter of high priority for all Member States of the European Union.

24. [2000] SC (JC) 555. The case is found at the Scottish Courts' website, <http://www.scotcourts.gov. uk/html/main.htm>.

25. On 31 Jan. 2001, the judgment was posted on the Scottish Courts' website, ibid. Of course Megrahi was Libyan, not a UK national. As such this case lends weight to the argument in favour of an explicit acceptance by UK courts of so-called protective jurisdiction, as the territorial connection to Scotland was tenuous. See P. Arnell, *Her Majesty's Advocate v Megrahi and Fhimah*, 8 Dec. 1999 [2000] Juridical Review 395.

26. Articles 6, 5 and 7 respectively.

27. Information pertaining to many of these can be found on the charity Prisoners Abroad's website at: <http://www.prisonersabroad.org.uk/>

28. See the BBC News website, <http://news.bbc.co.uk/> 5 Feb. 2001.

29. By s. 21(5) of the Human Rights Act 1998.

United Kingdom nationality based jurisdiction in a case such as Mitchell's, the only option open to Saudi Arabia is a trial there or the liberation of the suspect. From both the United Kingdom's human rights perspective and the foreign State's, who may not desire to try the individual and perhaps incur negative publicity and/or diplomatic pressure, the option to have a suspect tried within the United Kingdom on the basis of his nationality is a desirable one.[30]

A second central argument in favour of nationality based jurisdiction arises from a realignment in the relationship between the citizen and the State. Here it can be argued that the original rationale for nationality based jurisdiction has been revived. It has been said to trace 'its roots to ancient times, when territorial boundaries were often vague, and communities were defined by "the religion, race or nationality of the people rather [by] the territory" '.[31] As noted above, with the evolution of the European Union and international mobility generally[32] territorial boundaries are again, although in a new sense, 'vague'. In this new situation it is arguable that the relationship between the State and its citizens is being and should be strengthened. The incorporation of the ECHR is a reflection of this. The 1988 Act was passed 'to change the relationship between the state and the citizen . . .'.[33] The Labour government stated 'By increasing the stake which citizens have in society through a stronger constitutional framework of civil and political rights, we also encourage them to better fulfil their responsibilities. This is an essential part of our strategy to re-establish a balanced relationship between rights and responsibilities.'[34] It is arguable that these responsibilities are extant not only within the United Kingdom but also outwith. A further factor is a seemingly new extraterritorial dimension to the purposes of the criminal law. It appears that the law has evolved from its relatively narrow self-interested territorial purposes. This is most clearly illustrated by the Sex Offenders Act 1997, an enactment that goes considerably further than 'keeping the Queen's peace' or otherwise affecting behaviour that is or could be inimical to interests within the United Kingdom.[35] This Act *inter alia* aims to protect foreign children.[36] The conduct of United Kingdom nationals abroad in itself, as opposed to any

30. Not to mention the perspective of the suspect, who can be assumed to favour United Kingdom justice and, if convicted, incarceration in his own country nearer to family and acquaintances.

31. Watson, above n. 19 at 46, citing S. Kassan, *Extraterritorial Jurisdiction in the Ancient World* (1935) 29 AJIL 237 at 240.

32. Article 2 of the Fourth Protocol to the European Convention on Human Rights provides for the freedom of movement within a State and the freedom to leave any State. The United Kingdom is not a party.

33. Labour Party Consultation Paper: Bringing Rights Home: Labour's Plans to Incorporate the European Convention on Human Rights into United Kingdom Law, December 1996.

34. Ibid.

35. In 1959 Lord Devlin stated: 'The State must justify in some other way (than by reference to the moral law) the punishments which it imposes on wrongdoers and a function for the criminal law independent of morals must be found. This is not difficult to do. The smooth functioning of society and the preservation of order require that a number of activities be regulated . . .', cited in N. Walker, *Punishment, Danger and Stigma* (Blackwell, Oxford, 1980, at 18). The history and solidity of the territorial principle has been explained as being unsurprising as the 'beginning of our criminal justice in the troublous days of the dawn of civilization in the British Isles was concerned so exclusively with the problem of keeping the peace.', R. M. Perkins, *The Territorial Principle in Criminal Law* (1971) 22 Hastings Law Journal 1155 at 1157.

36. Baroness Blatch at second reading of the Bill stated: 'The Government are seriously concerned that people from this country are among those who travel to countries for the sole

actual or potential harm that might manifest within the United Kingdom, has become a concern of the criminal law. [37]

Final arguments in favour of a general nationality based jurisdiction emanate from the increasing internationalisation of criminal law and crime. The United Kingdom is bound to provide for the assumption of extraterritorial jurisdiction by international convention with reference to the nationality of the offender with increasing frequency. The nationality based jurisdiction in the Landmines Act 1998 is, for example, based upon the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.[38] A general nationality based jurisdiction would pre-empt the need for these individual references. It would bring some consistency and coherence to United Kingdom criminal jurisdiction where international law and perceived domestic need increasingly require the assumption of extraterritorial jurisdiction. Those travelling abroad could be certain that they remain liable to be held to account for the crimes they commit. In applying the law in such cases courts would not have to engage in casuistry in upholding United Kingdom jurisdiction.[39] Further this approach to jurisdiction would assist in the extradition of those accused of crimes where this was thought appropriate. The dual criminality requirement would be largely satisfied in cases where the requesting State also assumed jurisdiction on the basis of nationality.[40] Practically, nationality based jurisdiction would be useful where the authorities of the *loci delicti* were unable or unwilling to prosecute the crime due to financial constraints, technical or evidential difficulties, the sophistication of the crime etc.

IV. CONCLUSION

Criminal jurisdiction in the United Kingdom is in a muddle. The criminal law is still predominately territorial yet there are increasing and disparate exceptions. These exceptions are largely based upon the nationality of the alleged offender. They are becoming so numerous so as to challenge the general rule. Further, several significant and distinct positive reasons support a general nationality based criminal jurisdiction. From human rights to the European Union, and from new and/or revived notions of citizenship to extradition, strong arguments exist in its favour. These

purpose of sexually abusing young children there: so called "child sex tourists" ' . . . These provisions will supplement the other activities the government is undertaking to discourage child prostitution and exploitation worldwide. Hansard, HL, col. 548 (14 Mar. 1997).

37. It is plausible to argue that the nationality based offences cited above such as murder and manslaughter are intended to forestall the possibility of recidivism within the United Kingdom not harm done to foreign nationals. Admittedly the similar argument can be made in relation to sexual tourism offences.

38. (1998) Cmnd. 3990.

39. In *DPP v Stonehouse*, above n. 6, it was held that the media was the conveyor of an effect inducing insurance companies within the United Kingdom to act or possibly act, giving United Kingdom courts jurisdiction.

40. The practice of other States indicates how the United Kingdom might alter its law. French law, for example, contains a general nationality based criminal jurisdiction provision that distinguishes between crimes on the basis of their severity. It provides that in crimes of the most serious character no reference to the law of the *lex loci delicti* is required, whereas in relation to lesser crimes it is. See C. L. Blakesley, 'A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes' [1984] Utah LR 685.

negative and positive arguments conjoined lead to the conclusion that it is reasonable to amend the law of criminal jurisdiction so as to place nationality aside territoriality as a general basis of criminal jurisdiction.

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